81-6224

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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SUPREME COURT, U.S.

ORIGINAL

ROBERT FRANKLIN GODFREY,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Georgia

BRIEF IN OPPOSITION FOR THE RESPONDENT

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record for
Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3339

QUESTIONS PRESENTED

1.

Whether there was no double jeopardy violation presented by the use of a different statutory aggravating circumstance at Petitioner's resentencing proceeding?

2.

Whether there was no double jeopardy violation by the failure to charge Ga. Code Ann. § 27-2534.1(b)(2) at Petitioner's first sentencing proceeding?

3.

Whether the propriety of ordering a resentencing hearing in the instant case is a question of interpreting the State law on this point, and thus, should be governed by the decision of the Supreme Court of Georgia?

4.

Whether Ga. Code Ann. § 27-2534.1(b)(2) is constitutionally sound and was properly applied in the instant case?

5.

Whether the instructions given by the trial court to the jury during the sentencing phase amply provided for the consideration of mitigating circumstances?

6.

Whether the jury was properly allowed to consider all relevant mitigating circumstances in their consideration of Petitioner's sentence?

7.

Whether the trial court properly exercised its discretion in limiting voir dire?

8.

Whether the death sentence in the instant case is not arbitrary or capricious?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR NOT GRANTING THE WRIT

A. THERE WAS NO DOUBLE JEOPARDY VIOLATION PRESENTED BY THE USE OF A DIFFERENT STATUTORY AGGRAVATING CIRCUMSTANCE AT THE PETITIONER'S RESENTENCING PROCEEDING 4

B. THERE WAS NO DOUBLE JEOPARDY VIOLATION BY THE FAILURE TO CHARGE GA. CODE ANN. § 27-2534.1(b)(2) AT PETITIONER'S FIRST SENTENCING PROCEEDING 10

C. THE PROPRIETY OF ORDERING A RESENTENCING HEARING IN THE INSTANT CASE IS A QUESTION OF INTERPRETING THE STATE LAW ON THIS POINT, AND THUS, THIS COURT SHOULD BE GOVERNED BY THE DECISION OF THE SUPREME COURT OF GEORGIA 11

D. GA. CODE ANN. § 27-2534.1(b)(2) IS CONSTITUTIONALLY SOUND AND WAS PROPERLY APPLIED IN THE INSTANT CASE 13

E. THE INSTRUCTIONS GIVEN BY THE TRIAL COURT TO THE JURY DURING THE SENTENCING PHASE AMPLY PROVIDED FOR THE CONSIDERATION OF MITIGATING CIRCUMSTANCES 15

F. THE JURY WAS PROPERLY ALLOWED TO CONSIDER ALL RELEVANT MITIGATING CIRCUMSTANCES IN THEIR CONSIDERATION OF PETITIONER'S SENTENCE 19

Page

G. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN LIMITING VOIR DIRE. 21

H. THE DEATH SENTENCE IN THE INSTANT CASE IS NOT ARBITRARY OR CAPRICIOUS 22

CONCLUSION 24

CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

Cases cited:	Page(s)
Bullington v. Missouri, ____ U.S. ____, 101 S.Ct. 1852 (1981)	5, 7, 8
Burks v. United States, 437 U.S. 1 (1978)	5
Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979)	10
Eddings v. Oklahoma, ____ U.S. ____, 102 S.Ct. 869 (1982)	15, 17, 20
Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981).	14
Godfrey v. Georgia, 446 U.S. 420 (1980)	2, 4, 5, 6, 7, 22
Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979)	2
Godfrey v. State, 246 Ga. 359, 274 S.E.2d 339 (1980)	2
Godfrey v. State, 248 Ga. 616, ___ S.E.2d ___ (1931)	passim
Green v. Georgia, 442 U.S. 95 (1979)	20
Green v. State, 246 Ga. 598, 272 S.E.2d 475 (1980)	10
Green v. United States, 355 U.S. 184 (1957)	8
Gregg v. Georgia, 428 U.S. 153 (1976)	6, 17
Guaranty Trust Co. v. Blodgett, 287 U.S. 509 (1933)	11, 12
Kingsley Internationl Pictures Corp. v. Regents, 360 U.S. 684 (1959)	11, 12
Lockett v. Ohio, 438 U.S. 586 (1978)	17, 20
McNeal v. State, 228 Ga. 633, 187 S.E.2d 271 (1972)	21
Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977)	14
Spraggins v. State, 243 Ga. 73, 252 S.E.2d 620 (1979).	10
Strickland v. State, 247 Ga. 219, 275, S.E.2d 29 (1981)	14
Tyler v. State, 247 Ga. 119, 274 S.E.2d 549 (1981)	23

Statutes cited:	
Ga. Code Ann. § 27-2503(b)	11
Ga. Code Ann. § 27-2534.1(b)(2)	2, 4, 7, 10, 11
Ga. Code Ann. § 27-2534.1(b)(7)	2, 4

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ROBERT FRANKLIN GODFREY,

Petitioner,

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STATE OF GEORGIA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Georgia

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Robert Franklin Godfrey, was indicted by the Grand Jury of Polk County on December 15, 1977. Petitioner was charged with the murder of his wife, Mildred Godfrey, and his mother-in-law, Chessie C. Wilkerson. Petitioner was also charged with the aggravated assault of his daughter, Tracy Godfrey, in that he hit her in the head with the barrel of a shotgun.

Petitioner received a trial by jury in the Superior Court of Polk County on March 6-9, 1978. On March 9, 1978, the jury returned a verdict of guilty on each count. The jury was then allowed to consider the sentence to be imposed for the two murder charges.

After deliberation, the jury directed that the death penalty be imposed based on a partial finding of the seventh statutory aggravating circumstance. Ga. Code Ann. § 27-2534.1(b)(7). A motion for a new trial was denied by the trial court and a notice of appeal was filed to the Supreme Court of Georgia.

The Supreme Court of Georgia affirmed the convictions and sentences as to both counts. Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979). The Petitioner filed a petition for a writ of certiorari in this Court challenging those convictions. Certiorari was granted and this Court reversed the death penalties and remanded the case to the Supreme Court of Georgia for further consideration. Godfrey v. Georgia, 446 U.S. 420 (1980). The Supreme Court of Georgia on remand found that the death penalty was not proper and remanded the case to the trial court for either the imposition of a life sentence or resentencing. Godfrey v. State, 246 Ga. 359, 274 S.E.2d 339 (1980).

On November 17-20, 1980, a trial for sentencing was held in the Superior Court of Polk County. Petitioner was sentenced to death on each count of murder based on the second statutory aggravating circumstance. Ga. Code Ann. § 27-2534.1(b)(2). The jury found that each murder was committed during the course of another murder, which is a capital felony.

These sentences were appealed to the Supreme Court of Georgia pursuant to the mandatory review of the death penalties. In its review, the Supreme Court of Georgia noted that the death penalty for the murder of Mildred Godfrey was supported by the murder of Chessie Wilkerson and the death penalty for the murder of Chessie Wilkerson was supported by the murder of Mildred Godfrey. The court concluded that the two aggravating circumstances were

mutually supported and that one of the death penalties had to be set aside. The court arbitrarily eliminated the death penalty for the murder of Mildred Godfrey and remanded to the trial court for resentencing as to that count. The death penalty for the murder of Chessie Wilkerson was upheld. Godfrey v. State, 248 Ga. 616, ___ S.E.2d ___ (1981). A motion for rehearing was filed in that court and denied on December 16, 1981.

Petitioner subsequently filed the instant petition for a writ of certiorari to the Supreme Court of Georgia challenging the remaining death sentence. Further facts will be developed as necessary for a more thorough review of the issues presented by the present petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THERE WAS NO DOUBLE JEOPARDY VIOLATION PRESENTED BY THE USE OF A DIFFERENT STATUTORY AGGRAVATING CIRCUMSTANCE AT PETITIONER'S RESENTENCING PROCEEDING.

At Petitioner's first trial in the Superior Court of Polk County, the jury was presented with one statutory aggravating circumstance for its consideration, that is, "that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code Ann. § 27-2534.1(b)(7). The jury determined that the death penalty should be imposed based only on an incomplete finding of this aggravating circumstance, that is, "that the offense was outrageously or wantonly vile, horrible and inhuman." Godfrey, supra, 248 Ga. at 618. In reviewing the death penalty imposed, this Court found, "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." Godfrey v. Georgia, supra, 446 U.S. at 428.

Petitioner was subsequently returned to the trial court for resentencing pursuant to the directive of the Supreme Court of Georgia. At the resentencing proceeding, the jury was instructed on a different aggravating circumstance from that charged in the first trial, that is, that the murders occurred while the offender was engaged in the commission of another capital felony. Ga. Code Ann. § 27-2534.1(b)(2). Petitioner asserted prior to his resentencing hearing and in the Supreme Court of Georgia that

this constituted a double jeopardy violation. Petitioner is now again challenging the use of a different aggravating circumstance before this Court as a violation of the principles of double jeopardy. Petitioner relies mainly on the holding by this Court in Bullington v. Missouri, ___ U.S. ___, 101 S.Ct. 1852 (1981).

In considering the issue raised by the Petitioner, it is first necessary to consider the previous review of this case by this Court and the effect of that decision. See Godfrey v. Georgia, supra. Petitioner has asserted that the decision by this Court was, in effect, a decision that the evidence was insufficient to support the finding of the seventh aggravating circumstance; therefore, the resentencing of the Petitioner was improper under Burks v. United States, 437 U.S. 1 (1978). In so asserting, Respondent asserts that the Petitioner has misconstrued this Court's decision and has also misconstrued the subsequent holdings of the Supreme Court of Georgia.

On the initial review of the Petitioner's convictions and death sentences, the plurality opinion stated:

> "The issue now before us is whether, in affirming the imposition of the sentences of death in the present case, the Georgia Supreme Court has adopted such a broad and vague construction of the § (b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the United States Constitution."

Godfrey v. Georgia, supra, at 423. Thus, this Court specifically stated that it was reviewing the manner in which the

Supreme Court of Georgia conducted its review of the death penalty, not the sufficiency of the evidence presented to the jury.

The plurality opinion went on to discuss the requirement that a state apply its capital punishment law in a manner "that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.'" Godfrey v. Georgia at 428, quoting Gregg v. Georgia, 428 U.S. 153 (1976). The Court further emphasized this as the main issue to be considered when the plurality stated as follows:

> "In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible or inhuman.' (Footnote omitted) there is nothing in these few words, standing alone that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence.
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> ***
>
> The standardless and unchanneled imposition of death sentences and the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmmance of these sentences by the Georgia Supreme Court."

Godfrey v. Georgia at 428-429. The Court then went on to discuss the Supreme Court of Georgia's prior holdings regarding the seventh aggravating circumstance. The Court subsquently concluded that the validity of the death sentence turned on the question of whether the Supreme Court of Georgia applied a constitutional construction to the seventh aggravating circumstance as used in this case. Godfrey v. Georgia at 432. The subsequent discussion by the plurality of the phrase "depravity of mind" is not relevant to the instant case as no such finding was ever set forth by the jury.

In considering this point, the Supreme Court of Georgia, after the Petitioner's resentencing determined that this Court's decision in Godfrey v. Georgia and subsequent remand by the Supreme Court of Georgia was merely based on legal grounds, that is, that the verdict of the jury was incomplete because it did not specify the remainder of the statutory aggravating circumstance. This is clearly a trial error contemplated by the previous decision of this Court in that the trial court did not direct the jury to return either a finding of the entire aggravating circumstance or a decision for life imprisonment. As a trial error was the basis for the reversal, in the question of the sufficiency of the evidence to support the seventh aggravating circumstance is not relevant at this time. Furthermore, as noted by the Supreme Court of Georgia, sufficient evidence was presented at that first sentencing proceeding to support a finding of the second statutory aggravating circumstance presented in Ga. Code Ann. § 27-2534.1(b)(2). Godfrey v. State, 248 Ga. at 618.

Thus, the instant case is clearly distinguishable from Bullington v. Missouri, supra as no sufficiency of the evidence problem was presented in the instant case. Furthermore, a

significant distinguishing factor, noted by the Petitioner, is the fact that no death sentence was returned at the first trial in Bullington, supra. At the new trial, the same aggravating circumstances were used and the State announced that the evidence would be the same as the first trial. The Court placed great reliance on one of the basic premises underlying the double jeopardy clause, that is that the State "should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, aswellas enhancing the possibility that even though innocent he may be found guilty." Bullington, supra, 101 S.Ct. at 1861, quoting Green v. United States, 355 U.S. 184, 187-188 (1957). Thus, one specific consideration was the fact that the state in its first presentation had failed to convince the jury that the death penalty was proper in Bullington. In the instant case, the State did convice the jury that the death penalty was proper, and the jury so determined; however, an incomplete verdict was returned and a statutory aggravating circumstance that was appropriate was not presented to the jury for its consideration. Thus, under these principles, the double jeopardy clause should not prevent the use of a different aggravating circumstance at Petitioner's resentencing.

Respondent asserts that no double jeopardy violation is presented in the instant case by the use of a different aggravating circumstance at Petitioner's second sentencing proceeding. The intitial finding of this Court in the plurality opinion was not based on the sufficiency of the evidence but on a trial error. Furthermore, even if it were considered to be a finding of insufficiency of the evidence, that only would relate to the finding of that particular aggravating circumstance

and not the sufficiency of the evidence presented to impose the death penalty. Clearly, the jury found sufficient facts to justify the death penalty and there should not be found an implied acquittal of that penalty.

B. THERE WAS NO DOUBLE JEOPARDY VIOLATION BY THE FAILURE TO CHARGE GA. CODE ANN. § 27-2534.1(b)(2) AT PETITIONER'S FIRST SENTENCING PROCEEDING.

Petitioner continues his argument under the double jeopardy clause by asserting that the failure of the State to use both statutory aggravating circumstances at the first sentencing proceeding amounts to a waiver by the State of the use of the second aggravating circumstance. Petitioner asserts that in some manner the trial court made a directed verdictof acquittal as to this aggravating circumstance based on Petitioner's construction of Georgia law. This argument of the Petitioner's is based on his construction of the Georgia capital punishment statute.

In considering this issue on direct appeal, the Supreme Court of Georgia noted that double jeodardy did not attach to such circumstances so as to prevent the State from using a different aggravating circumstance at a resentencing proceeding. The court ruled that under the Georgia law, the State is not limited to the aggravating circumstances relied upon at the first hearing. Godfrey v. State, 248 Ga. at 619; Green v. State, 246 Ga. 598, 272 S.E.2d 475 (1980); Spraggins v. State, 243 Ga. 73, 252 S.E.2d 620 (1979); Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979). The court held, "we do not agree that failure to submit aggravating circumstances which are raised by the evidence is an implied directed verdict of acquittal on these aggravating circumstances." Godfrey v. State, 248 Ga. at 619.

Petitioner contends that the Supreme Court of Georgia erred in the above holding and attempts to assert that under Georgia law this would be an implied acquittal and a waiver by the State.

It is well-recognized that the highest court of the state is the final authority on the interpretation of statutes of that state. Kingsley International Pictures Corp. v. Regents, 360 U.S. 684 (1959). Furthermore, an interpretation by a state court of a statute is as binding as if the language was expressly set forth in the statute itself. Guaranty Trust Co. v. Blodgett, 287 U.S. 509 (1933). Thus, Respondent asserts the ruling by the Supreme Court of Georgia as to the question of whether a new aggravating circumstance can be presented at a resentencing procedure under Georgia law should be binding on this Court. The only issue this Court can consider in this regard is whether this addition of an aggravating circumstance presents a double jeopardy problem. As it has previously been shown that no double jeopardy violation occurred, Respondent submits that this issue presents no federal question for review by this Court.

C. THE PROPRIETY OF ORDERING A RESENTENCING HEARING IN THE INSTANT CASE IS A QUESTION OF INTERPRETING THE STATE LAW ON THIS POINT AND, THUS, THIS COURT SHOULD BE GOVERNED BY THE DECISION OF THE SUPREME COURT OF GEORGIA.

Petitioner asserts that there was no statutory authority for a resentencing trial pursuant to the remand by the Supreme Court of Georgia. This issue was addressed by the Supreme Court of Georgia on appeal after the resentencing. That court found, "However in capital felony cases, the authority for remand is implicit in the mandate of Code Ann. § 27-2537(c)(2) that this court review the death sentence." Godfrey v. State, 248 Ga. at 620, citing Ga. Code Ann. § 27-2503(b). As previously noted, this Court should be bound by the interpretation of a state statute set forth by the highest court of a state.

Kingsley, supra; Guaranty Trust, supra. Thus, Respondent submits that this issue presents no federal question for review by this Court.

It is also obvious from reviewing the statutory provisions that the Supreme Court of Georgia did have statutory authority to order a resentencing hearing. As previously noted, the Supreme Court determined that a trial error did occur and that this served as the basis for its earlier remand. This Court should not disregard a state court's holding as to the basis of its decision except for convincing reasons. Guaranty Trust, supra at 512. Thus, this Court should except the reasoning of the Supreme Court of Georgia and conclude that no federal question is presented as the court did have the statutory authority for a remand.

Petitioner also asserts under this allegation that the state violated a statute when the trial court refused to certify a question for interlocutory appeal concerning the alleged double jeopardy issue. This issue was considered in great length by the Supreme Court of Georgia. That court determined that the trial court properly exercised its specific authority granted by the Supreme Court of Georgia in its unappealed order remanding the case to the court. Furthermore, as noted by the Supreme Court of Georgia, there was clearly no harm in the denial of the motion to enjoin the proceeding as the issue was raised in the Supreme Court of Georgia and that court determined that there was no double jeopardy problem presented. Godfrey v. State, 248 Ga. 621. The most that the court could have done would be to agree that an interlocutory appeal should have been certified; however, it would have been futile to grant such an interlocutory appeal at that time because the issue was already before the Georgia Supreme Court for consideration. Thus, it is clear that this allegation

presents no federal question for review by this Court.

D. GA. CODE ANN. § 27-2534.1(b)(2) IS CONSTITUTIONALLY SOUND AND WAS PROPERLY APPLIED IN THE INSTANT CASE.

Petitioner challenges the use of the second statutory aggravating circumstance at his resentencing hearing, asserting that this circumstance should only apply to a situation where a murder is committed during the course of a crime such as an armed robbery and not in the case of two murders. Petitioner further asserts that the crime of murder is complete upon the death of the victim and that it would be impossible to have a murder committed during the course of another murder. Petitioner continually alleges that this code section does not reach multiple murder situations, although failing to point out that this is not a standard "mass murder" circumstance, but is a case of two murders occurring within five minutes of each other.

This issue was also considered by the Supreme Court of Georgia in its review of this case after resentencing. Once again, that court set forth the proper construction to be given this statutory provision which should govern this Court.

Contrary to Petitioner's assertion, the "other capital felony" suggested by this statutory aggravating circumstance does not exclude murder. The code section provides that the death penalty may be imposed if, "the offense of murder, rape, armed robbery or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree." Ga. Code Ann. § 27-2534.1(b)(2). Thus, it is clear from the plain language of the statute that the other

capital felony can either be murder, rape, armed robbery or kidnapping. The offense can also be committed while the perpetrator was engaged in the commission of an aggravated battery, burglary or arson in the first degree.

In considering the application of this second aggravating circumstance in prior cases, the Supreme Court of Georgia has determined that it is proper to use this aggravating circumstance in cases involving more than one murder and to use the additional murder as the other capital felony. In Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977), the court upheld the imposition of the death penalty for murder based on the use of a second murder as an aggravating circumstance. The court again considered this situation in Strickland v. State, 247 Ga. 219, 275 S.E.2d 29 (1981). The court noted in that case that "we have applied Code Ann. § 27-2534.1(b)(2) when two murders were committed in a relatively short period of time in what could be fairly viewed as one continuous course of criminal conduct." Id. at 230, citing Peek, supra. In Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981), the court again considered the question of the appropriateness of using the second aggravating circumstance when the "other offense" is a murder. It was argued at that time that the accompanying capital felony should be a continuing offense such as armed robbery and that one murder could not be accomplished during the commission of another. The court held, "we find this construction of Code Ann. § 27-2534.1(b)(2) excessively narrow and decline to adopt it. Id. at 837.

In the instant case, the Supreme Court of Georgia referred to its prior decision in Gilreath and found that "under the plain meaning of the statute, multiple murders are included as 'another capital felony.'" Godfrey v. State, 248 Ga. at 620. Thus, the Supreme Court of Georgia has set forth the interpretation to be

given to the statute and this should be considered the correct interpretation by this Court.

Based on these prior decisions of the Supreme Court of Georgia, it is clear that this interpretation is not unconsitutionally vague and that the statute is not unconstitutionally vague. The statute clearly setsforth capital felonies which may be considered in using the second aggravating circumstance and clearly includes murder as one of those capital felonies. The evidence presented by the Petitioner in the instant case in the form of the death certificates of the two victims show that they died within five minutes of each other. In this case, clearly the two murders occurred as part of a continuing transaction, and thus, one could reasonably be said to have occurred during the commission of the other. This does not present any vagueness in this statute, but is a clear interpretation to be drawn from the plain language of the statute. Thus, no federal question is presented for review by this issue as the Supreme Court of Georgia has interpreted the statute on many occasions to include the exact situation that occurred in the instant case.

E. THE INSTRUCTIONS GIVEN BY THE TRIAL COURT TO THE JURY DURING THE SENTENCING PHASE AMPLY PROVIDED FOR THE CONSIDERATION OF MITIGATING CIRCUMSTANCES.

Petitioner challenges the charge of the trial court in regard to mitigating circumstances, and particularly complain that concrete examples were not provided for the jury and that the jury was not informed it should weigh mitigating circumstances against aggravating circumstances. Petitioner specifically relies on this Court's decision in Eddings v. Oklahoma, ___ U.S. ___, 102 S. Ct. 869 (1982).

At the resentencing hearing, the trial court charged the jury as follows:

> "In all cases for which the death penalty may be authorized the law provides that the judge shall instruct the jury concerning mitigating circumstances or aggravating circumstances which the jury may consider in making the decision which will determine punishment to be imposed for each offense. Mitigating circumstances are those which do not constitute justification or excuse for the offense in question but which in fairness and in mercy may be considered as extenuating or reducing the degree of moral culpability."

(ST. 624). 1/ The court went on to specify that aggravating circumstances must be found beyond a reasonable doubt before a death sentence could be considered. The court then instructed the jury as to the specific aggravating circumstance to considered and charged, "in arriving at your verdict in this case you will consider the evidence as to the mitigating circumstances which the defendant contends exist in this case or any other mitigating circumstances you may find from the evidence." (ST. 625). From this charge it is clear that the court gave a sufficient definition of mitigating circumstances so that the jury understood what could be considered. The court also instructed the jury that they were to consider all mitigating circumstances in determining whether to impose the death sentence or the life imprisonment.

1/ ST. refers to the transcript of Petitioner's resentencing hearing.

In considering this issue on appeal, the Supreme Court of Georgia noted, "Examples of mitigating circumstances are not required to be charged during the sentencing phase of the trial." Godfrey v. State, 248 Ga. at 622. The court further concluded that the instructions of the trial court were not subject to any other defects.

Respondent asserts that Petitioner's reliance on Eddings, supra, is misplaced in the instant case. The decision by this Court in Eddings did not state that certain mitigating circumstances must be presented to the jury. To the contrary, this Court merely ruled that the sentencing body, be it judge or jury could not be precluded from considering any mitigating factor as a matter of law. Id. at 876. This decision follows the previous decisions by this Court concerning charges on mitigating circumstances. In Lockett v. Ohio, 438 U.S. 586 (1978), the plurality opinion noted that a sentencer could not be precluded from considering any aspect of a defendant's character or record and any circumstances of the offense as mitigating factors. No requirement was set forth that these mitigating factors be enumerated for the jury. Furthermore, this Court in Eddings, cited to the previous decision in Gregg v. Georgia, 428 U.S. 153 (1976) and reasoned, "by its requirement that the jury find one of the statutory aggravating circumstances listed in the death penalty statute, and by its direction to the jury to consider 'any mitigating circumstances,' the Georgia statute properly confined and directed the jury's attention to the circumstances of the particular crime and to 'the characteristics of the person who committed the crime....'" Eddings at 874, quoting Gregg at 197. Thus, this Court has explicitly upheld the provision of the Georgia law instructing the jury to consider any mitigating circumstances and not providing for a direct list to be considered.

Respondent submits that there is no requirement that specific mitigating circumstances be listed for the jury. The definition given of mitigating circumstances in the instant case was sufficient to explain to the jury that they could consider anything that might be presented or that they might find that could possibly be considered mitigating. The jury was also sufficiently instructed that these mitigating circumstances could be sufficient to result in their imposition of a life sentence even though they did find the presence of a statutory aggravating circumstance. Thus, the instructions in the instant case are clearly constitutionally sufficient.

F. THE JURY WAS PROPERLY ALLOWED TO CONSIDER ALL RELEVANT MITIGATING CIRCUMSTANCES IN THEIR CONSIDERATION OF PETITIONER'S SENTENCE.

Petitioner asserts that he offered evidence, allegedly in mitigation, at the sentencing phase of his trial which was improperly excluded by the court. The particular evidence complained of was testimony by Ms. Patsy Morris of the American Civil Liberties Union of Georgia. Ms. Morris testified before the court in the absence of the jury so that the court could determine if her testimony was actually relevant to mitigation. Ms. Morris indicated that her qualifications consisted of a bachelors degree in early childhood education with minors in psychology, religion and political science. (S.T. 529). Her testimony dealt with alleged statistics concerning the imposition of the death penalty in the State of Georgia. These statistics were allegedly broken down as to the race and age of the victim and the defendants as well as the socioeconomic class of the victim and defendant. No testimony was given specifically relating to the facts and circumstances of the Petitioner's case. Petitioner sought to show that the death penalty was infrequently imposed in situations similar to his. Based on that, the court ruled that this testimony was totally irrelevant to any mitigating factor that could possibly be presented and excluded the testimony. (S.T. 537). The Supreme Court of Georgia ruled,"Such evidence is not of a mitigating nature but, rather, addresses itself to an issue required under the statute to be decided upon appeal." Godfrey v. State, 248 Ga. at 622. Petitioner asserts that this evidence should be

admitted pursuant to this Court's previous holdings concerning mitigation. Petitioner cites this Court to its decision in Green v. Georgia, 442 U.S. 95 (1979). In that case, this Court ruled that testimony relevant to a critical issue in the punishment phase could not be excluded. That particular testimony was the confession of a co-defendant which indicated that the co-defendant actually commited the crime. This is clearly distinguishable from the instant case in which the Petitioner sought to introduce evidence not relevant to the Petitioner or to the crime he committed.

In Lockett v. Ohio, supra, the plurality of this Court ruled:

> "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer...not be precluded from considering, as a mitigating factor, any aspect of the Defendant's character or record and any of the circumstances of the offense that the Defendant proffers as a basis for a sentence less than death."

Lockett, supra, at 604 (emphasis in original). This finding was followed by this Court in Eddings v. Oklahoma, supra.

Respondent submits that it is clear from the decisions of this Court that it is mandatory that the jury be allowed to consider any evidence in mitigation, meaning evidence pertinent to the Defendant's character or record or pertinent to the circumstances of the offense, not evidence related to the imposition of the death penalty in general. The evidence

presented by the Petitioner relates to occasions in which the death penalty has been imposed in Georgia, not to the circumstances of the Petitioner's offenses nor to the character or record of the Petitioner. Thus, it was clearly irrelevant to the question of mitigating circumstances and was properly excluded by the trial court.

G. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN LIMITING VOIR DIRE.

Petitioner challenges the exercise of the discretion of the trial court in limiting voir dire questioning concerning the death penalty. Petitioner's counsel was permitted to ask questions concerning the death penalty and each juror's general feelings toward the death penalty. The court precluded questions which would require the jurors to prejudge the verdict. Petitioner's counsel attempted to ask the jurors what punishment they thought would be appropriate for someone convicted of murder. The Supreme Court of Georgia noted that the conduct of voir dire was within the sound discretion of the trial court and that general questions and technical legal questions were not proper voir dire questions. Godfrey v. State, 248 Ga. at 621; McNeal v. State, 228 Ga. 633, 187 S.E.2d 271 (1972). The court found no abuse of the discretion of the trial court, particularly in light of the charge to the jury on capital punishment.

Although Petitioner asserts that this is an abuse of discretion on the part of the court because it prevented him from learning of the personal biases of the jurors, this overlooks the fact that Petitioner was allowed to ask

certain questions of the jurors and does not consider the fact that the questions were improper under Georgia law. Those questions would require the potential jurors to prejudge the case or to make legal or technical determinations. Petitioner complains that his answers from the jurors subsequent to the ruling by the court were merely that they could follow the law. This is clearly all that is required of the jurors. If the jurors can follow the law as given to them by the trial court, no matter what their personal beliefs may be, then any belief they have is not going to be sufficient to influence their verdict. Thus, Respondent submits that this allegation does not present a federal question for review by this Court.

H. THE DEATH SENTENCE IN THE INSTANT CASE IS NOT ARBITRARY OR CAPRICIOUS.

Petitioner challenges the imposition of the death penalty in the instant case asserting that it is arbitrary and capricious as it is basically a "domestic murder." Petitioner then takes great pains to distinguish the cases included in the appendix to the decision of the Supreme Court of Georgia from the instant case. Petitioner also cites instances in which the Supreme Court of Georgia distinguished those cases from the facts in Godfrey v. Georgia. Petitioner's analysis ignores the central fact that those decisions by the Supreme Court of Georgia distinguishing the cases from the instant case were based on a consideration of the application of the seventh statutory aggravating circumstance and its appropriateness under the facts of those cases in light of this Court's decision in Godfrey v. Georgia. This case is now being considered as more than just a "domestic murder" situation, but is a case involving

a multiple murder under the second statutory aggravating circumstance. As was noted by the Supreme Court of Georgia in prior cases,"Although lesser sentences than death are frequently imposed in domestic murder cases, it does not follow that the death penalty would not be authorized for the murder of one spouse by another under any circumstances." Tyler v. State, 247 Ga. 119, 126, 274 S.E.2d. 549 (1981). The court noted that it not only considered domestic murder cases but multiple murder cases. "In 3 of the 7 cases [involving domestic murders] in which the death penalty was returned, not only did Defendant have no prior record, but also there was a history of prior psychiatric disorder, as in the instant case. Therefore, we find the appellant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant." Godfrey v. State, 248 Ga. at 624.

In determining whether the death penalty in the instant case is arbitrary or capricious, the Court must consider all facts and circumstances involved. While this case does involve a domestic murder type of situation, it also involves the case of one person killing two individuals within a matter of minutes. This factor alone takes it out of the range of normal domestic murder situations. The prior decisions of the Supreme Court of Georgia distinguishing cases using the seventh aggravating circumstance from the instant case are not relevant to a consideration of the death penalty in the instant case at this time because this case is now being presented under a completely different aggravating circumstance./2

/2 This Court should also recall that the first jury considering the death penalty in the instant case thought that there was sufficient evidence to support the death penalty.

Although there are distinctions between the cases in the appendix to the decision by the Supreme Court of Georgia and the instant case, there are also similarities in the cases as found by that court. It should also be pointed out that the Supreme Court of Georgia had the benefit of considering the entire record in each of the cases in the appendix while the Petitioner is apparently relying on only the reported decisions of those cases.

Respondent asserts that when viewed in light of all of the facts and circumstances, the death penalty in the instant case is not arbitrary or capricious. The evidence amply supported a finding of the second statutory aggravating circumstance and the jury was authorized to find the death penalty based on that aggravating circumstance. Thus, this allegation is without merit.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Robert Franklin Godfrey.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant Attorney General

MARION O. GORDON
Senior Assistant Attorney General

JOHN C. WALDEN
Senior Assistant Attorney General

MARY BETH WESTMORELAND
Counsel of Record for the Respondent

Please serve:

MARY BETH WESTMORELAND
132 State Judicial Bldg.
Atlanta, Georgia 30334
TelephoneL (404) 656-3339